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Supreme Court, U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

MELVIN R. HORNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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II. QUESTIONS PRESENTED

A. May a person be legally prosecuted and convicted under conspiracy law for an alleged conspiracy offense in which the only alleged unacquitted co-conspirator was a government agent during the final eight (8) months of the life of the conspiracy as alleged in the indictment?

B. Whether "good faith" is an appropriate jury instruction in a prosecution for conspiracy to defraud the government, 18 USC §371, as to which the courts of appeal differ.

III. LIST OF PARTIES

All parties to the cause of action are included in the caption.

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2. The jury should have been instructed on the Sears [v. United States, 343 F.2d 139, 142 (5th 1965)] Rule 18

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VI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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MELVIN R. HORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

The Petitioner, MELVIN R. HORNE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on direct appeal, United States v. Melvin R. Horne, on 24 August 1987.

VII. OPINIONS BELOW

The opinion of the Court of Appeals was a per curiam affirmance reported at _____ F.2d _____ and reprinted in the Appendix.

VIII. JURISDICTION

The case originated as a criminal prosecution in the United States District Court Northern District of Florida, Tallahassee Division. Upon conviction direct appeal of the final order, judgment and sentence, was timely prosecuted to the United States Court of Appeals, Eleventh Circuit, pursuant to 28 U.S.C. §1291. The oral argument panel affirmed without opinion on 02 July 1987. Rehearing and suggestion for en banc consideration was filed on 23 July 1987 and denied on 24 August 1987. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rules 20.1.

IX. STATUTES INVOLVED

18 U.S.C. §371

X. STATEMENT OF THE CASE

MELVIN R. HORNE was a former Assistant United States Attorney and later a practicing attorney (R37-332) who was jointly indicted with his uncle and law partner, Mallory E. Horne, (R1-1) after a two-and-a-half-year undercover investigation by the Federal Bureau of Investigation (F.B.I.). The F.B.I. enlisted two of the law firm's clients as agents. The F.B.I. used the firm to set up a cover corporation. The defense extensively centered on government overreaching, due process and entrapment.

The Indictment consisted of thirteen counts, co-defendant Mallory E. Horne was acquitted of all thirteen counts (R42-17-18). MELVIN HORNE was acquitted of nine of the thirteen counts (R42-16), Mr. HORNE was convicted of conspiracy to defraud the United States, mail fraud (Counts II and VII), and wire fraud (Count XII). MELVIN HORNE was sentenced on 26 November 1985 to a term of imprisonment of five years on Count I followed by five years total consecutive probation on the

remaining three counts (R8-325). Bail on appeal was denied by the district court and by order of the Eleventh Circuit over the signature of one of the panel members. The conspiracy count alleged in pertinent part:

> From on or about July 1, 1980, until on or about October 28, 1983, in the Northern District of Florida and other geographical districts of the United States, MELVIN R. HORNE and MALLORY E. HORNE, defendants herein, did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with Robert John Dugan, who is named as a coconspirator but not as a defendant, to defraud the United States . . . in violation of Title 18 United States Code, Section 371.

There were no other alleged coconspirators, "known or unknown." Mallory E. Horne was acquitted on all counts (R42-17-18). The only other alleged coconspirator, Robert J. Dugan, was acknowledged by the government as being an informant for the government and a government cooperative (R2-72; R7-259; R34-237). Robert Dugan began cooperating with the Federal Bureau of Investigation during the dates alleged for the

existance of the conspiracy. Dugan became an agent in early March 1983 (R21-82; R33-59) and continued to cooperate with the FBI during the last eight (8) months of the conspiracy as alleged in Count Iof the indictment.

Appellant argued to the Eleventh Circuit that conviction of the conspiracy count as alleged constituted a legal impossibility due to the fact that the proof allowed the jury to convict Mr. HORNE for conspiring with a government agent. The government answered that the issue should be governed by principles of withdrawal from a conspiracy. Mr. HORNE asserted in reply that the legal analysis of the government's argument was in fact a theory of prejudicial/nonprejudicial variance to an indictment, and went on to argue that an unconstitutional amendment to the indictment had occurred or in the alternative a prejudicial variance took place when the proof revealed that Mr. Dugan was a government agent during the life of the alleged conspiracy, leaving the conclusion from the allegations that MELVIN

HORNE conspired with Robert Dugan who was an acknowledged and admitted government agent.

Oral argument was held on 24 June 1987 in Miami, Florida before Judge Gerald B. Tjoflat, Judge Robert S. Vance, Judge Clarence W. Allgood.[1] The panel per curiam affirmed the conviction without a written opinion on 02 July 1987.

XI. REASONS FOR GRANTING THE WRIT

A. Important Question

The case in its present posture represents an improper broadening of the pervasive and wide sweeping nets of conspiracy prosecutions. Grunewald v. United States, 353 U.S. 391, 77 S.Ct 963, 1 L.Ed.2d 931 (1957), involved a conspiracy question which included application of the statute of limitations. The Court exercised discretionary certiorari to review the case as an "important question." The question of importance for the

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[1] Senior Judge, United States District Court, Northern District of Alabama, sitting by designation.

Court is the permissible extent of undercover investigations of lawyers who are approached by their clients turned government agents and perform legal services for those client-agents.

B. Conflicts

1. A Prejudicial Amendment of the Indiction Occurred at Trial.

In United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811 (1985), the Court addressed the issue of whether the Fifth Amendment's grand jury guarantee is violated when a defendant is tried under an indictment that alleges a certain fraudulent scheme but is convicted on a significantly narrower and more limited, though included scheme. The Court revised the definitions of "amendment" and "variance" to an indictment. The Court analyzed Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), and Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252 (1960). The Court held that the broadening of an indictment is an amendment which is constitutionally impermissible in that a

court cannot permit a defendant to be tried on charges that are not made in the indictment against him. Narrowing of an indictment at trial is not per se reversible. The charges may not be broadened through amendment except by the grand jury itself. To the extent that Bain stood for the proposition that it was an unconstitutional amendment to drop from the indictment allegations which were unnecessary to an offense, "narrowing" the indictment, Bain was rejected. United States v. Miller, supra, 105 S.Ct. at 1819.

The proof during the Horne trial broadened the charges by adding the fact that Robert Dugan was a government agent. The acquittal of Mallory Horne served to further amend the indictment by deletion of a necessary element, a co-conspirator who was not a government agent during the time periods set out in the indictment. The jury was therefore allowed to convict for conspiring with a government agent. Several cases since Miller have analyzed the effect of prejudicial amendments to the indictments.

United States v. Adams, 778 F.2d 1117 (5th Cir. 1985), a post Miller case, held that an amendment to the indictment is per se reversible because the jury may have convicted the defendant on a ground not charged in the indictment. The Fifth Circuit (JJ. Goldberg, Randall, Johnson) held that the jury should not be permitted to convict a person on a factual basis that effectively modifies essential elements of the offense. Mr. HORNE was before a lay jury on a conspiracy charge for an alleged agreement between himself and a person who for the last eight months of the charged time period was operating as a government agent. Additional modification of the essential elements in the prosecution of Mr. HORNE occurred by the acquittal of the only other jointly liable defendant. These facts resulted in a changing of terms of the coconspirator and "altered literally or in effect" the theory of liability after the grand jury had passed on the theory. Such an alteration literally or in effect by prosecution, proof, or court is not

constitutionally tolerable. United States v. Atisha, 804 F.2d 920 (6th Cir. 1986). The charging terms were altered. The facts did not conform to any theory of criminal behavior and were materially different from those alleged in the indictment. The variance crossed over the constructive amendment line because a substantial likelihood was created that Mr. HORNE was convicted for the offense of conspiring with a government agent. United States v. Hathaway, 798 F.2d 902 (6th Cir. 1986). The modification of the elements by proof at trial, United States v. Davis, 679 F.2d 845 (11th Cir. 1982), was prejudicial even if treated as a "variance."

The government is then left to argue that there was sufficient evidence prior to the legal termination of the conspiracy upon which the conviction could be based. The jury in the goverment argument, reasonably could have relied on prior acts or statements. The jury, just as reasonably, could have convicted Mr. HORNE for inadmissible coconspirator statements which

occurred, and were allowed into evidence, after the termination of the conspiracy.

There was no allegation by the grand jury of any "other" coconspirators (except Mr. Mallory E. Horne who was acquitted). The question of whether agent Dugan was a link between Mr. HORNE is therefore not legally present. The issue is similar to Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965), where:

> Although the evidence was sufficient to support the conspiracy charged, it was not the province of the jury to convict Sears merely upon finding that he had accepted money from [informant] Davis and furnished protection.

The proof could have established only that Mr. HORNE had "conspired" with informant Dugan, and "as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy." Id. In view of the posture of the evidence and the charge actually given by the court, the jury may well have believed that it could convict Mr.

HORNE simply by believing that he agreed with informer Dugan.

2. "Good Faith" is an Appropriate Jury Instruction for the Charge of Conspiracy to Defraud Under 18 U.S.C. §371.

The case below conflicts with the case of United States v. Hopkins, 744 F.2d 716 (10th Cir. 1984), en banc. The Tenth Circuit, on en banc rehearing, held that the failure of the given instructions to submit the issue of "good faith" required that convictions for mail fraud and conspiracy to use the mail to defraud be set aside, and the cases be remanded for new trial. In determining reversible error, the Tenth Circuit remarked as follows:

> The "good faith" instruction is required to be given as a separate subject. Thus instructions on wilfulness [sic], on aspects of intent, on untruth of representations or fraudulent statements are not sufficient for this purpose. There must be a full and clear submission of the good faith defense as such. United States v. Steiger, 373 F.2d 133 (10th Cir.). See also United States v. Beitscher, 467 F.2d 269 (10th Cir.); Mesch v. United States, 407 F.2d

> 1286 (10th Cir.). [emphasis by the court]
>
> Our holding as to the need for a good faith instruction in the above cases is intended to apply to both substantive and conspiracy counts for mail or wire fraud. [emphasis added]

United States v. Hopkins, supra, 744 F.2d at 718.

It is settled law that conspiracy to violate a criminal law is bottomed on an unlawful and willful intention, and the intent to accomplish an object cannot be alleged more clearly than by stating that the parties conspired to accomplish it. MELVIN HORNE was charged with a conspiracy to defraud the United States by hindering the Internal Revenue Service, 18 U.S.C. §371. It was Mr. HORNE's defense at trial that he acted in good faith without criminal intent and without guilty knowledge and that he was entrapped (Closing argument, R41-26) (See also R40-16).

In a conspiracy case, two different types of intent are generally required -- the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more

traditional intent to effectuate the object of the conspiracy. United States v. U.S. Gypsum Co., 438 U.S. 422, 443; 98 S.Ct. 2864, 2877; 57 L.Ed.2d 854 (1978), fn. 20. Fraudulent intent was therefore an element of the conspiracy charged in Count I of the Indictment. The Indictment charged that Mr. HORNE "did unlawfully, knowingly and willfully conspire, combine, confederate and agree to defraud" the United States by obstructing the Internal Revenue Service in its duly appointed task. When fraudulent intent is an element of the crime, the prosecution has the burden of proving such intent beyond a reasonable doubt. Spies v. United States, 317 U.S. 492, 497 (1943). "Good faith" constitutes an absolute defense to such crimes. Beck v. United States, 305 F.2d 595 (10th Cir. 1962), cert. denied, 371 U.S. 890.

The "good faith" instruction performs three (3) important functions. First, it tells the jury in straightforward terms that good faith is an absolute defense. Second, the instruction explains that the defense pertains to the state of

the defendant's mind at the time of the alleged crime and that he cannot be found guilty merely for making an honest mistake. Third, the instruction is careful to explain that, when good faith is interposed as a defense, it is the government's burden to prove the requisite bad faith beyond a reasonable doubt. See, e.g., United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982).

C. Error in the Court Below

1. The conspiracy as alleged and proven was a legal impossibility.

"It is impossible . . . for a man to conspire with himself." Morrison v. California, 291 U.S. 82, 92; 54 S.Ct. 281, 285 (1934). The theory is referred to as the traditional rule. The traditional rule merely recognizes, by definition, the legal impossibility of the existence of a criminal agreement under circumstances where all coconspirators are acquitted. The conclusion is sound and consistent with the definition of conspiracy. The essence of

a conspiracy is the agreement between two (2) or more individuals, neither being a government agent or informer. Iannelli v. United States, 420 U.S. 777, 95 S.Ct. 1284, 1289 (1975). "[T]he existence of a coconspirator is not only an element of the crime [of conspiracy], it is the essence of the crime." United States v. Pearson, 667 F.2d 12, 13 (5th Cir./Unit B 1982).[2] The principle that a single defendant cannot be convicted of conspiracy in the same proceeding in which all of his alleged coconspirators are acquitted is founded on a failure of proof of an essential element of the crime as a matter of law. Herman v. United States, 289 F.2d 362 (5th Cir. 1961), cert. denied 368 U.S. 897 (1961).

Count I of the indictment, as amended by the Government's proof would set forth:

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[2]Unit B, former Fifth Circuit case, Section 9 (1) of Public Law 96-452, 10 October 1980, binding on the Eleventh Circuit absent en banc opinion, Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982).

> From on or about July 1, 1980, until on or about October 28, 1983,... MELVIN R. HORNE . . . did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with Robert John Dugan, [who was a government agent from early March 1983 and] who is named as a coconspirator but not as a defendant, to defraud the United States by impeding . . . the Intrnal Revenue Service.

The original indictment did not allege Mr. HORNE conspired with "other persons to the grand jurors known and unknown." Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951), Cf., United States v. Albert, 675 F.2d 712, 713 (5th Cir. 1982). A person can be convicted of conspiring with persons who are not identified by name in an indictment so long as the indictment asserts that such other persons exist and the evidence supports such an assertion. Rogers v. United States, 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344, 350 (1950). No such identification or assertion is present in the indictment after the deletion of Mr. Mallory Horne and the addition of Mr. Dugan's government agent status.

Where two (2) defendants have been tried before the same jury with the same evidence being produced, a not guilty verdict on the conspiracy count as to one defendant necessarily precludes the conviction of the alleged coconspirator. United States v. Roark, 753 F.2d 991 (11th Cir. 1985); United States v. Sheikh, 654 F.2d 1057 (5th Cir./Unit A 1981), cert. denied, 455 U.S. 991, 102 S.Ct. 1617 (1982); United States v. Klein, 560 F.2d 1236 (5th Cir. 1977), cert. denied, 434 U.S. 1073, 98 S.Ct. 1259 (1978); United States v. Pearson, supra 662 F.2d at 13 (5th Cir. Unit B 1982) (per curiam); United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985). "A conspiracy cannot be committed by a single individual acting alone . . . ." Herman v. United States, supra 289 F.2d, at 368.

2. The jury should have been instructed on the Sears [v.United States, 343 F. 2d. 139, 142 (5th 1965)] Rule.

Trial counsel[3] did not request a Sears instruction. No objection was made to the jury instructions on the Sears rule. The jury instruction issue was not raised in a motion in the district court.[4] However, the Court would be justified in resolving the issue "where the proper resolution [is] beyond any doubt . . . or where 'injustice might otherwise result.'" Singleton v. Wulff, 428 U.S. 106, 121; 96 S.Ct. 2868, 2877; 49 L.Ed.2d 826 (1976), citations omitted.

The failure to instruct the jury on the Sears rule in the context of the facts of the case was plain error. Substantive rights are implicated. Without an instruction on the Sears rule the jury may well have believed it could convict Mr. HORNE for 'conspiring' with Dugan after March 1983. Cf.

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[3]Other counsel represented Petitioner at trial.

[4]The "Dugan-as-Agent" was a part of the motion to dismiss for government misconduct raised pretrial, during trial and post-trial.

United States v. Lively, 803 F.2d 1124, 1126 (11th Cir. 1986). As in Lively, Mr. HORNE was induced into considerable post termination conversation (Gov. Exhibits 1DNT (1-2), 31 PNT (1-2), 52 VT (1), 95 PT (1), 57 NT (1-2), 102 PT (1), 103 PT (1), 104 PT (1), 105 PT (1), 106 PT (1), 107 PT (1), 110 PT (1). Relying on this evidence, the jury may have concluded that Mr. HORNE and Mr. Dugan formed the charged conspiracy on a later date, because nothing in the court's charge to the jury indicated that Dugan could not have conspired with appellant at that time.

The deficiency is inherent in the pattern jury instructions of the Eleventh Circuit (Appendix) utilized by the trial court. "First that two or more persons came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the Indictment." (Appendix). The deficiency here should be noted by the Court and corrected by granting the writ.

The failure of the district court to give the requested good faith instruction as to Count I of

the Indictment not only deprived Mr. HORNE of an instruction on his theory of the case, but the modified and abbreviated instruction that the district court did give actually was a misstatement of the correct standard of law where the Indictment alleged a conspiracy to defraud.

The pattern jury instructions of the Eleventh Circuit do not provide for good faith as a defense to a conspiracy to defraud. Where one is acting in concert with a government agent, the broader approach of the Tenth Circuit is more appropriate. The failure to properly instruct the jury therefore deprived Petitioner of his right to have the jury properly instructed on his theory of defense. Cf. James v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.E.2d 468 (1978).

VIII. CONCLUSION

For the reasons set forth above, it is respectfully submitted that certiorari should be favorably entertained. The overlap of time period from Dugan's cooperation through time of the

conclusion of the alleged "conspiracy" also merged with "Dugan-as-Agent" in the remaining counts.

In the allegation of "The Scheme," which was incorporated by reference pleading permissible under Fed. R. Crim. P. 7(c)(1), the Indictment alleged (R1-1-4 to 5) Mr. HORNE devised a scheme to defraud. The purpose of "the scheme" was to assist agent Robert John Dugan evade taxes, to assist agent Robert John Dugan in hiding assets, preparing false documents of the source of agent Robert John Dugan's income, and arranging the covert transfers of assets belonging to agent Robert Dugan. Coupled with the Pinkerton[5] theory of vicarious liability, upon which the jury was instructed, the jury no doubt convicted Mr. HORNE for the wrongdoing of a government agent. Review by the Supreme Court is appropriate to set the parameters of permissible governmental conduct in

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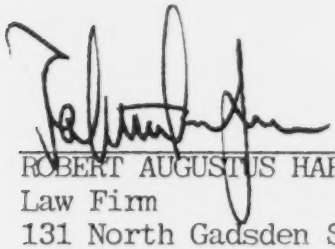
[5]Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

covert investigations. The definition of conspiracy should be structured to preclude a conspiracy with a government agent. The good faith defense concept should be enunciated in the concept of a conspiracy to defraud.

Respectfully submitted,



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